FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

RYAN ALLEYNE, MICHAEL BICETTE, ALICIA SANES, MARIA SANES, FRANCIS MCFARLANE, WEENA MCFARLANE, ANNIEVA MCFARLANE, MARIAN DEPORT, DERICK DEPORT, LAURIE LEE ROBERTS, CECIL ROBERTS, ANGELA ROBERTS, LILLIAN RODRIGUEZ, CAROL JOSEPH, JAMES JOSEPH, JENNIFER JOSEPH, PETER GEORGE, EILEEN ROACH, DESMOND ROACH, MAURICE BROWNE, ALICE BROWNE, DEXTER FREDERICK, ANDREA BRATHWAITE, GENITTA RICHARDS, CHRISTINA BRATHWAITE, CUTHBERT CHARLES, UEL MASSIAH, JESSE MASSIAH, EFRAIN SANTIAGO, JULIO DAVIS, GERMAN HERNANDEZ, FRANCIS JAGRUP, VERDAN JAGRUP, GENEVIEVE DAVIS, JUSTINO NAVARRO, ELIS RIVERA, AGATHA JOHN FANUS, MARTHA ISAAC THOMAS, VALENCIA WILLIAMS, ALEXIS BROWNE, RUBINA FRANCIS, ALECIA SAMUEL, RAYMONIA LEONCE, ALVIN LEONCE, JAMIE COOK, VERNALYN CHARLES, MYRLE MARVOL ST. AIMIE, NICOLE GIRARD, THELMA SERAPHIN, YVETTE CLENDENEN, MARIE BERRY, DAISY FRANCIS CHRISTOPHER, AISHA ANDREWS GRIFFITH, KIMA RENEE TRISH FRANCIS, ADELLA DORIS FRANCIS, JARKYM JEREMIAH CHRISTOPHER, ALEXANDRINA SEALEY, MICHAEL EDWARDS, MILDA LUZ MENDEZ, ETHLYN VELINOR, LESLIE RODRIGUEZ, ROBERTO RODRIGUEZ, ROBERTO RODRIGUEZ, JR., THAMARA RODRIGUEZ, SUEHEIDI RODRIGUEZ, STEVEN LAURENT, EDSEL BRYAN, JENNELL BRYAN, CECELIE BRYAN, SUZERINE MERRIFIELD, RAFAEL RIVERA, RUFUS DANIEL, AIDA SANTIAGO, CELESTINO SANTIAGO, TERESITA FLEMING, JOSEPH ALBERT, EDWARD JOHN, BLAISE ALEXANDER, DORCAS ALEXANDER, DOROTHY KATTICK, MARY LEONCE, ICILMA HENDRICKSON, RAFAEL LINARES, BEVERLY WILLIAMS, DEBORAH RICHARDSON, JORGE FERRER, DAISY FERRER, ZEPHANIAH BYRDE, MIRIAM BYRDE, CONSUELITA CORDERO, VINCENT GREENE, ANTONIO SANES, GERMAN GARCIA, ANTHONY FRANK, SHERAN FRANK, AGATHA GENTIUS, PAULINUS GENTIUS, JOSE AYALA, HEATHER LEWIS, JACQUELINE LEWIS, VERONICA JOSEPH, RITA JOSIAH, HOLBURN CARR, CELESTINE CARR, LEONARD SWEENEY, CYNTHIA DESUZA, MARIE JOHN, LEON ABRAHAM, ADDISON JOHN LEWIS, EDUARDO MOLINA,	)	CASE NO. SX-13-CV-143 ACTION FOR DAMAGES JURY TRIAL DEMANDED

ANA MOLINA, VICTOR HARRY, FRANCILLIA HARRY, JULES BENJAMIN, MAUDRY BENJAMIN, GABRIEL CYRIL, CELINA CYRIL, BRIAN EUGENE, DELBERT DUJON, JOSEPH FREDERICK, LUCIA FREDERICK, MARGARET RICHELIEU, JULIAN CONSTABLE, LEROY DAVIS, VALERY REGISSON, STEVEN CHARLES, AYBERT LEON, JORGE ORTIZ, ZORAIDA CASANOVA, DAVID SANDY, ELSIE SANDY, CHARLES NICHOLAS, ZENAIDA AYALA, EVELYN WEBSTER, MARIANE JULES, HENRY JAMES, FRANCES CHANCELLOR, JOSE ACOSTA, GEORGINA ACOSTA, GLENDINA ISAAC, PHILBERT ISAAC, MARY HARELLE, MARY CARLEY, MERCEDES REYES, MARCUS GILBERT, FELICITE GILBERT, AUGUSTIN TOMMY, CHRISTUS THEOPHILUS, MARIELLA ST. ROMAIN, ALBERT JOHN, ALLAT WILLIAMS, AMABELL WILLIAMS, LEO ALEXANDER, FREDERICK JNBAPTISTE, MARIE JNBAPTISTE, MARY LEON, MAGDALENA CARRASQUILLO, NAICHA MINTAS and STEDROY MINTAS,

Plaintiffs,

v.

DIAGEO USVI, INC. and CRUZAN VIRIL, LTD.,

Defendants.

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MEMORANDUM OPINION

MOLLOY, Judge.

BEFORE THE COURT are: (1) a motion for a more definite statement filed by the Defendants, and (2) a motion for leave to file a second amended complaint filed by the Plaintiffs. For the reasons stated below, the Court will grant the Defendants' motion in part and grant the Plaintiffs' motion but drop all Plaintiffs except Ryan Alleyne from this case and order them to refile their claims separately. The Court will also direct the Clerk to open a master case captioned as *In re: Rum Fungus Claims* to coordinate these cases.

I. BACKGROUND

On April 29, 2013, eight people[1] commenced this action as a class action, seeking damages for negligence, nuisance, and trespass and injunctive relief due to the release of ethanol vapors from

* Admitted *pro hac vice*.

[1] Susie Sanes, Enid V. Alleyne, Marco Blackman, and Alicia Sanes subsequently dismissed their claims voluntarily.

the rum storage facilities operated on St. Croix by Defendants Diageo USVI, LLC and Cruzan Viril, Ltd. Plaintiffs allege that the distillation process causes *Baudoinia compniacensis* ("Baudoinia"), sometimes referred to as rum fungus,[2] to grow on their homes and on vegetation surrounding their homes. Plaintiffs eventually agreed to withdraw their class allegations and Defendants allowed Plaintiffs more "time to evaluate whether additional Plaintiffs should be added." (Jt. Stip. ¶ 7, filed June 2, 2017.) Discovery was stayed in the meantime.

On October 17, 2017, Plaintiffs filed an amended complaint, adding approximately 150 individuals as plaintiffs. After an agreed-to extension of time, Defendants responded on December 1, 2017 by filing a motion for a more definite statement. Plaintiffs did not respond to the Defendants' motion. Instead, on December 29, 2017, Plaintiffs filed a motion for leave to file a second amended complaint, to which Defendants did not file a response.

Following a January 10, 2018 telephonic status conference where the Court "questioned whether Plaintiffs could file a second-amended complaint that would add to this litigation over 150 persons as party-plaintiffs or [whether they] should instead be required to file separate complaints," (Order 1, entered Jan. 12, 2018 (citations omitted)), the Court directed Plaintiffs to show cause in writing why the Court should not grant their December 29, 2017 Motion but drop all Plaintiffs except Ryan Alleyne and sever the claims of the other newly-named Plaintiffs. Plaintiffs filed a brief in opposition to severance on January 26, 2018. Defendants responded jointly in support of severance on February 9, 2018. Plaintiffs replied on February 23, 2018.

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[2] Also referred to as "whiskey fungus" in jurisdictions where whiskey is distilled. *See e.g.*, *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 686 (6th Cir. 2015); *Brown-Forman Corp. v. Miller*, 528 S.W.3d 886, 888 (Ky. 2017).

II. DISCUSSION

A. Motion for a More Definite Statement

Virgin Islands Rule of Civil Procedure 12(e) provides that "[a] party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." "If an opposing party cannot prepare an adequate response, because the facts alleged in support of the claim are deficient or too vague, then the party moves for a more definite pleading." *Willie v. Amerada Hess Corp.*, 66 V.I. 23, 38 (Super. Ct. 2017) (citations omitted). "Courts may also order claimants to flesh out the issues in their pleadings and provide further detail, either *sua sponte* within their inherent authority to move the case forward efficiently and orderly, or by construing a motion to dismiss as a motion for a more definite pleading." *Id.* at 39 (quotation marks and citations omitted).

Defendants seek an order directing each individual Plaintiff to answer the following questions:

1) Whether the Plaintiff owns or leases the property at issue;
2) The dates during which the Plaintiff owned or leased the property at issue;
3) The dates each Plaintiff claims that *Baudoinia* was present on the property and the extent of *Baudoinia* on the property during the time period identified; and
4) A breakdown of the damages to each individual Plaintiff, if any, caused by the presence of *Baudoinia* on the property, including damage to real or personal property as well as any vegetation.

(Defs.' Mot. for a More Definite Stmt. 7-8, filed Dec. 1, 2017 ((italics added) (hereinafter "Defs.' Mot.").) In support, they contend that Plaintiffs' first amended complaint "suffers from two fundamental flaws that should be corrected through a more definite statement." *Id.* at 1. First, the amended complaint "contains allegations with respect to individuals who no longer appear to be a part of the suit," Defendants point out, and second, the complaint gives "no specific, individualized allegations as to many of the properties at issue, relying instead on common allegations to establish the key elements of each Plaintiffs claim." *Id.* Given this overall history of the case, *cf. Alleyne v. Diageo USVI, Inc.*, 63 V.I. 384 (Super. Ct. 2015), Defendants want "Plaintiffs to correct any errors in the FAC [or first-amended complaint] . . . and to allege specific facts sufficient to support a cause of action with respect to each of the individual properties at issue." *Id.* at 4.

Defendants recognize that former class representatives dismissed from this case may have been "inadvertently [re-]added." *Id.* (citation omitted). But they contend that requiring them to have to answer allegations for persons no longer party to this lawsuit would be prejudicial. And since "it is within a court's authority to order the plaintiff to correct" errors in a complaint," *id.* (citing *Mitchell v. Gen. Eng'g Corp.*, 67 V.I. 271, 284 (Super. Ct. 2017), the Court should order Plaintiffs to give "a more definite statement with respect to the individuals and properties that are subject to their action." *Id.* Defendants recognize that "[t]he crux of this case is—and always has been—whether Defendants' ethanol emissions caused a specific type of fungus—*Baudoinia*—to grow on Plaintiffs' properties in a sufficient quantity." *Id.* (italics added). Consequently, each Plaintiff should have to allege sufficient information regarding her or his own property, and any amended complaints should have to state "specific allegations that indicate that *Baudoinia* is present on the property or present in a sufficient quantity to cause harm" for each Plaintiff named in the complaint. *Id.* at 7 (italics added). "[E]ven under liberal notice pleading, each plaintiff in a mass action 'must give a short and plain statement of each of their claims and the grounds in support,'" Defendants argue, "rather than relying on 'mass statements in a mass complaint alleging claims *en masse*.'" *Id.* at 5 (quoting *Abednego v. St. Croix Alumina, LLC*, 63 V.I. 153, 190 (Super. Ct. 2015)).

Although Plaintiffs did not file a response in opposition to Defendants' motion for a more definite statement, their December 29, 2017 motion for leave to file a second-amended complaint nonetheless responded.[3] And in response, Plaintiffs countered that, if the Court were to grant them leave to file their second-amended complaint, it would "moot" Defendants' motion. (Pls.' Mot. for Leave to File 2d Amend. Compl. 4, filed Dec. 29, 2017 ("Pls.' Mot.").)

Before turning to the merits, the Court must address a technical issue in that both sides appear to believe that when a motion for a more definite statement is granted, an amended pleading must be filed. (*Cf.* Defs.' Mot. 7 ("[T]he Court should grant Defendants' Motion for More Definite Statement and order the Plaintiffs to provide more specificity *in their allegations* with respect to

[3] The Court takes exception to Plaintiffs' motion insofar as Plaintiffs asserted arguments in response to Defendants' motion in their own motion, rather than in a separately-filed response. (*Cf.* Pls.' Mot. 4 ("Finally, the SAC addresses the two grounds on which defendants based their motion for a more definite statement.").) "Courts and counsel should be able to trust that a document's title correlates with its content. A response should respond, not also incorporate a request or a motion." *In re: Red Dust Claims*, SX-15-CV-620, 2017 V.I. LEXIS 98, *31 n.7 (V.I. Super. Ct. July 7, 2017). A motion should request relief from the court, not also incorporate a response to another motion, that is, not unless the document is appropriately titled as a response in opposition and a motion. Litigants can combine different court papers together so long as it does not cause confusion or delay and does not exceed page limits. Courts too have construed motions as responses when necessary. *E.g.*, *Johnson v. Orkin, LLC*, 928 F. Supp. 2d 989, 993 n.1 (N.D. Ill. 2013) ("The Court construes Johnson's motion as a response brief to Defendants' motion to dismiss because in his motion he responds, with legal arguments, to Defendants' bases for dismissing his complaint in an attempt to defeat Defendants' motion to dismiss." (citation omitted)); *Sharpe v. MCI Telecomms. Corp.*, 19 F. Supp. 2d 483, 487 (E.D.N.C. 1998) ("Because MCI has not filed a proper motion to strike under Rule 12(f), the Court must interpret MCI's motion as a response to Sharpe's motion which challenges the motion on procedural grounds."). So, the Court could construe Plaintiffs' December 29, 2017 motion for leave to file second-amended complaint as a response in opposition to Defendants' December 1, 2017 motion for more definite statement. But that would be not be proper here. First, Plaintiffs' time to respond to Defendants' December 1, 2017 motion passed on December 21, 2017—twenty days after the motion was filed. *See* V.I. R Civ. P. 6-1(f)(2) ("A party shall file a response within 20 days after service of a motion under Rule 12 upon the party."); V.I. R Civ. P. 6(a)(1)(B) ("[W]hen the period is 15 days or more, count every day, including intermediate Saturdays, Sundays, and legal holidays."). Plaintiffs did not ask for additional time to respond. Second, Plaintiffs' points in response to Defendants' motion were perfunctory and made without supporting authority, which does not comply with Virgin Islands law. *See Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 428 n.13 (V.I. 2016) ("[T]here is absolutely no basis in any of this Court's precedents for the proposition that attorneys are not required to fully brief all questions of law relevant to the issues that are being litigated."). Finally, whether a motion has been rendered moot is for a court to decide. *See generally. Der Weer v. Hess Oil V.I. Corp.*, 60 V.I. 91 (Super. Ct. 2014) (motion not rendered moot despite representations of counsel to the contrary).

each Plaintiff and property." (emphasis added)); Pls.' Mot. 1 ("[T]he SAC moots defendants' motion for a more definite statement, which was filed in response to the FAC."). But that's not accurate.

Admittedly, "[t]he rule is silent as to whether an entire amended complaint must be filed and served in response to an order for more definite statement of a part of the complaint." Jay E. Grenig, 2C *West's Fed. Forms, District Courts-Civil* § 11:149 (5th ed. 2006) ("Often only a document such as the form will be used, but local rules must be checked to ascertain whether amendments must be made by submission of complete amended complaints."). And some federal courts have held that an amended pleading must be filed if a motion for a more definite statement is granted. *See, e.g.*, *Shallal v. Gates*, 254 F.R.D. 140, 142 (D.D.C. 2008); *Sefton v. Jew*, 204 F.R.D. 104, 106 (W.D. Tex. 2000); *F.D.I.C. v. Reiner*, 144 F.R.D. 599, 600 (D. Me. 1992). *But cf. Cas. Indem. Exch. v. Small Fry, Inc.*, 709 F. Supp. 1144, 1145 (S.D. Fla. 1989) ("[R]ead the 'more definite statement' *in conjunction with* the complaint in resolving the pending summary judgment motion." (emphasis added)); *Zanakis-Pico v. Cutter Dodge, Inc.*, 47 P.3d 1222, 1236 (Haw. 2002) (reading complaint and more definite statement together). Virgin Islands courts also have observed that an amended pleading should be filed when a motion for a more definite statement is granted. *E.g., James v. Antilles Gas Corp.*, 43 V.I. 37, 39 (Terr. Ct. 2000); *Lodgek v. Lang*, 14 V.I. 118, 121 (Terr. Ct. 1977). But these cases ignored the plain language of the rule as well as its history.

Virgin Islands Rule of Civil Procedure 12, like its federal counterpart, states that, "if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after *the more definite statement is served*." V.I. R. Civ. P. 12(a)(4)(B) (emphasis added); *accord* Fed. R. Civ. P. 12(a)(4)(B). The rule clearly requires that a statement be served, not an amended pleading. Moreover, Virgin Islands Rule of Civil Procedure 12 was borrowed from Federal Rule of

Civil Procedure 12 and, therefore, federal precedent is instructive. *Cf. In re: Asbestos, Catalyst, & Silica Toxic Dust Exp. Litig.*, 68 V.I. 494, 502 (Super. Ct. 2018); *accord People v. Rivera*, 68 V.I. 393, 405 (Super. Ct. 2018) (citing *Ventura v. People*, 64 V.I. 540, 616 (2016)). And federal precedent long ago recognized that the more definite statement is akin to a bill of particulars. In fact, the two are identical. *See Hibbits v. Thompson*, 7 F.R.D. 454, 454 (W.D. Mo. 1947) ("As a rule a motion for a more definite statement is the exact equivalent of the motion for a bill of particulars. . . . In other words, the motion for a more definite statement is really a motion for a bill of particulars."); *accord Sec. Credit Corp. v. Willey*, 265 P.2d 422, 423 (Utah 1953) ("[A] bill of particulars merely had as its goal the amplification of the complaint. The Federal . . . and Utah Rules provide another means of obtaining the information formerly sought by a bill of particulars; that is, through a motion for a more definite statement." (citations omitted)).[4] Accordingly, this Court holds that the document to be filed when a motion for a more definite statement is granted is a statement that provides the additional information requested and not necessarily an amended pleading.

Turning to the merits, the Court first acknowledges that "Rule 12(e) motions are highly disfavored since the overall scheme . . . [of notice pleading] calls for relatively skeletal pleadings and places the burden of unearthing factual details on the discovery process." *Woodson v. Akal*, ST-16-CV-399, 2017 V.I. LEXIS 130, at *2 (Super. Ct. Aug. 17, 2017) (quotation marks and citation omitted).

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[4] *See also Hodgson v. Va. Baptist Hosp.*, 482 F.2d 821, 823 (4th Cir. 1973) ("A major aim of American procedural reform has been to reduce reliance on pleadings to refine the evidentiary basis for a litigant's claim. The early state procedure codes, modeled after the New York code drafted by David Dudley Field, tried to simplify common law pleading by requiring a complaint to state the facts constituting each cause of action. Judicial hostility to the codes, however, generated complex distinctions between law, facts, and evidence to nullify the attempt to simplify pleading. To avoid these technicalities, the drafters of the Federal Rules substituted the word claim for cause of action, dropped the requirement that the complaint allege facts, and expanded discovery procedures, but even these changes were not entirely successful. To clarify the original intent of the rules, the bill of particulars was abolished by the 1946 amendments which became effective in 1948. The same amendments restricted the motion for a more definite statement to pleadings so vague or ambiguous that the opposing party could not frame an appropriate response.").

But cf. Mitchell, 67 V.I. at 285 ("When confronted with a shotgun complaint, a trial court should order the plaintiff to give a more definite statement of his claims, even if the defendant does not ask for one." (quotation marks, brackets, and citation omitted)). And when "the details . . . being sought . . . are, without exception, more appropriately obtained through the discovery process," *Hobson v. Gov't of the V.I.*, 20 V.I. 413, 418 (Terr. Ct. 1984) (quotation marks and citation omitted)), the motion should be denied. But if the details sought concern potential defenses that could be raised and might be otherwise waived if not timely asserted, then ordering a more definite statement would be proper. In fact,

> many courts have found it expedient to require claimants to state more fully matters relating to possible threshold defenses, even though the claim as originally pleaded was sufficiently definite to enable the defendant to respond to the complaint, which means that the pleading was not technically open to attack under Rule 12(e). Plaintiffs thus have been required to give particulars about the date on which the claim arose, so that the timeliness of the action could be determined, and have been asked to state whether the contract they were suing on was written or oral, for the purpose of applying the Statute of Frauds.

Charles Alan Wright, Arthur R. Miller, *et al.*, 5C *Federal Practice & Procedure: Civil* § 1376 (3d ed. 2004) (footnotes omitted).

In this instance, much of the information Defendants seek does not concern potential defenses. In fact, much of what they seek can be gleaned through discovery. Whether each Plaintiff owns or leases her or his home (request #1) can be disclosed through interrogatories. The extent of damage to their real or personal property (request #4) can be addressed in depositions. And the dates that each Plaintiff leased or purchased her or his real or personal properties (request #2) can be found out through requests for admission. Hence, the information Defendants seek in requests 1, 2, and 4 is not relevant to preparing a defense and their motion for a more definite statement must be denied as to these requests.

But Defendants are entitled to know approximately when *Baudoinia* appeared on each Plaintiffs' properties (request #3). Even in a notice pleading jurisdiction, a complaint must include a short and plain statement showing that each plaintiff is entitled to the relief demanded. *Accord Abednego*, 63 V.I. at 190 ("[T]he decision to jointly assert the claims of more than 2,000 individual plaintiffs in one lawsuit does not relieve each plaintiff of the obligation to demonstrate a plausible entitlement to relief." (quotation marks and citation omitted)). And stating a claim for relief necessarily requires given the date when the claim accrued. *Cf. Oresman v. G. D. Searle & Co.*, 321 F. Supp. 449, 458 (D.R.I. 1971) (ordering more definite statement) ("The date of the alleged stroke should be alleged in order that defendant may plead the statute of limitations if it be applicable." (citation omitted)); *accord Watkins v. Foresberg*, 2:15-cv-02446-GMN-CWH, 2017 U.S. Dist. LEXIS 79694, *10 (D. Nev. Apr. 25, 2017) ("Although the Federal Rules of Civil Procedure adopt a flexible pleading standard, Plaintiff still must give Defendants fair notice of the reasons Plaintiff claims they violated his civil rights.").

The Court takes judicial notice, for purposes of this Opinion only, that Cruzan "has produced rum on St. Croix for over 220 years, but not . . . Diageo, which only began producing rum on St. Croix recently." *Alleyne*, 63 V.I. at 407-08. Consequently, Plaintiffs should have a rough approximation of when they noticed "black stain[s], black dots, and soot" appearing "on their homes (both interior and exterior) and other buildings, businesses, vehicles, trees, plants, fruits, and vegetables, and various other personal property." (First Am. Compl. ¶ 135.) Without this information, Defendants cannot know if they have a statute of limitations, laches, or other time-related affirmatives defenses. Accordingly, the Court will grant Defendants' motion as to the portion of request #3 that seeks to know approximately when each Plaintiff first noticed *Baudoinia* on their properties.

Defendants' motion will be denied, however, as to the portion of request #3 that seeks a more definite statement concerning "the extent of *Baudoinia* on the property during the time period identified." (Def's Mot. 7.) The Court's research has not uncovered any jurisdiction that has adopted a minimum exposure requirement or threshold growth requirement for property claims concerning *Baudoinia*. Discovery will reveal how significant the growth of *Baudoinia* is or was on each Plaintiffs' properties and, if necessary, the parties can revisit this issue through a later motion.

B. Motion for Leave to File Second Amended Complaint

Virgin Islands Rule of Civil Procedure 15 provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." V.I. R. Civ. P. 15(a)(2). Defendants did not give written consent when Plaintiffs filed their December 29, 2017 Motion. Hence, leave of court is required. For the reasons explained below, justice requires granting Plaintiffs leave in this case.

In their December 29, 2017 Motion, Plaintiffs seek leave to amend and to file a second amended complaint to correct clerical errors and "to add plaintiffs who were mistakenly omitted." (Pls.' Mot. for Leave to File 2d Amend. Compl. 1, filed Dec. 29, 2017 ("Pls.' Mot.").) Plaintiffs explain that their first amended complaint had "added 155 plaintiffs and removed two plaintiffs." *Id.* at 2. But they concede that, "[d]ue to a clerical error," the amended complaint "mistakenly included allegations concerning six individuals who were not named as plaintiffs: Marco Blackman, Anistia John, George John, Enid V. Alleyne, Susie Sanes and Suzie Sanes" and "mistakenly named Christina Brathwaite as a plaintiff." *Id.* (internal citations omitted). Further, the amended complaint also "mistakenly failed to name as plaintiffs Nilda I. Dujon, Oswyn Massiah, Naomi Joseph, Didace Scotland, Bazilida Scotland, Cecil Theodore, Jr., Angela Theodore, Medina Christopher, and Matthew

Gilbert." *Id.* (internal citations omitted). Since "[t]he proposed [second amended complaint or] SAC removes the allegations concerning the individuals not named as plaintiffs," and "also clarifies that all plaintiffs own their properties, alleges that all of the properties are contaminated with *Baudoinia* and includes separate allegations of harm for each individual plaintiff," *id.* at 3, the Court should grant leave and accept the second amended complaint. "None of the circumstances for denying leave are present here," Plaintiffs argue. *Id.* "The SAC simply adds plaintiffs similarly situated to the plaintiffs named in the FAC. It does not contain new theories of liability." *Id.* Instead, it will "correct clerical errors made in the FAC – it removes allegations concerning individuals who are not plaintiffs and adds plaintiffs who were mistakenly omitted from the FAC." *Id.* at 4. Plaintiffs contend that their second amended complaint also "addresses the two grounds on which defendants based their motion for a more definite statement" and thus, "moots defendants' motion for a more definite statement." *Id.*

First, insofar as Plaintiffs voluntarily offered to amend their complaint to "moot" Defendants' motion, the Court will not interfere, notwithstanding the determination, *supra*, that Defendants are not entitled to all the information they requested. That said, more detail in a complaint is not prohibited by notice pleading requirements. *Cf. Stuebig v. Hammel*, 446 F. Supp. 31, 35 n.12 (M.D. Pa. 1977) ("Further factual specificity in the complaint would provide defendants with more detail of plaintiff's case but would not further the basic principle of notice pleading. It would be inappropriate here to require such specificity when such matters are more properly a concern during discovery." (citation omitted)); *see also Toth v. Borough of Ambridge*, 06cv1696, 2007 U.S. Dist. LEXIS 17766, *5 (W.D. Pa. Mar. 9, 2007) ("[T]here is no provision in the Federal Rules of Civil Procedure for striking merely superfluous 'allegations' that flesh out the claims made in more detail than is necessary under notice pleading." (footnote omitted)). *But cf. Felekey v. AT&T*, No. 3:02-CV-691 (CFD), 2004 U.S. Dist. LEXIS 25443, *23 (D. Conn. Nov. 3, 2004) ("Connecticut employs a fact pleading standard rather than a notice pleading standard, and as such requires more detail in pleadings than the federal standard requires." (quotation marks and citation omitted)). Since Plaintiffs offered to provide Defendants with some of the information they sought, the Court will grant leave to amend.

Second, justice requires granting Plaintiffs leave to allow them to correct certain errors in their complaint. As Defendants note, "[w]here a complaint contains errors, it is within a court's authority to order the plaintiff to correct them." (Defs.' Mot. 4 (citing *Mitchell*, 67 V.I. at 284).) And Plaintiffs concede that "the SAC simply removes and adds plaintiffs to correct clerical errors made in the FAC." (Pls.' Mot. 4.) In fact, Plaintiffs and Defendants failed to identify all the errors with the proposed amended complaint.[5] Consequently, granting leave to amend is necessary here to allow Plaintiffs to correct errors in the complaint.

C. Show Cause Order Regarding Joinder of Plaintiffs

Finally, the most important reason why Plaintiffs must be granted leave to amend their complaint is because the claims of all Plaintiffs other than Ryan Alleyne must be severed and the other Plaintiffs dropped. Both Defendants' motion for a more definite statement and Plaintiffs' motion for leave to file a second-amended complaint illustrate the concerns the Court raised in its

[5] For example, Plaintiff Alicia Sanes was named in the initial complaint filed on April 26, 2013. She was also named in the first-amended complaint. And she remains a party in the proposed second-amended complaint. (*See* Proposed 2d Amend. Compl. ¶ 12 ("Maria Sanes and Alicia Sanes are citizens of St. Croix and at all times material hereto resided at 71 Estate Cane, Frederiksted, St. Croix.").) But by order entered May 26, 2017, the Court approved a May 3, 2016 joint motion to dismiss Alicia Sanes. (*Accord* Hr'g Tr. 155:14-16 ("[T]he reason I'm skipping Alicia Sanes is we've agreed to drop her case and the Court has agreed to sign the order." (stmt of Pls.' former counsel). *But cf.* Defs.' Jt Resp. to Pls.' Br. in Resp. to Order to Show Cause 1-2, filed Feb. 9, 2018 ("Defs.' Br.") (stating that "of the original eight plaintiffs, three remain" and listing Alicia Sanes (along with Ryan Alleyne and Michael Bicette) as the three remaining plaintiffs).)

show cause order, questioning whether multiple plaintiffs should have joined together in the same complaint when their alleged injuries are dissimilar, and their potential damages are not identical.

Plaintiffs found no fault with how they proceeded. They contend that "joinder is proper here under Virgin Islands Rule of Civil Procedure 20(a), which places no limit on the number of plaintiffs who may join in an action." (Pls.' Br. in Resp. to Show Cause Order 1, filed Jan. 26, 2018 ("Pls.' Br.").) In fact, federal "courts have routinely permitted hundreds of plaintiffs to join in a single action," they argue, "as long as their claims arise out of the same occurrence and involve common questions of law and fact." *Id.* at 4 (citing *Adinolfe v. United Tech. Corp.*, 768 F.3d 1161, 1172 (11th Cir. 2014); *Abrams v. Ciba Specialty Chem. Corp.*, Civ. No. 08-0068-WS-B, 2008 WL 4710724, *1 (S.D. Ala. Oct. 23, 2008); *Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Haw. 1995); *Utah v. Am. Pipe & Constr. Co.*, 49 F.R.D. 17, 21 (C.D. Cal. 1969)). Since federal precedent is instructive when interpreting identical Virgin Islands rules of procedure, the Court should recognize that "[t]he purpose of Rule 20 is to expedite the resolution of disputes and eliminate unnecessary lawsuits." *Id.* at 3 (citing *Alexander v. Fulton Cty*, 207 F.3d 1303, 1322 (11th Cir. 2000) (*en banc*)). Plaintiffs further contend that joinder is proper here because joinder

> serves the core purpose of Rule 20: to avoid unnecessary lawsuits and to expedite the resolution of disputes. The alternative to joinder – requiring each plaintiff to file his or her own separate lawsuit and then consolidating those suits – would serve no purpose other than adding a costly and time-consuming step to the litigation.

Id. at 4-5. Consequently, since the Court will most likely "enter a joint discovery plan and likely designate a group of bellwether plaintiffs for trial," "multiply[ing] the proceedings with 156 separate filings from both parties and additional orders from the court" is unnecessary, Plaintiffs argue, since "the end result will put the litigation in the same posture." *Id.* at 5.

Defendants counter that "decisions under Rule 20 are 'addressed to the sound discretion of the Court to make such orders as may be required to prevent delay and prejudice.'" (Defs.' Br. 1-2 (quoting *Allied Chem. Corp. v. Strouse, Inc.*, 53 F.RD. 588, 589 (E.D. Pa. 1971); citing *Alexander v. HOVIC*, No. 323/1997, et seq., 1998 WL 3587703, *2 (V.I. Terr. Ct. Jan. 23, 1998)) (hereinafter "Defs.' Resp.").) Joinder was not proper here, however, Defendants argue, because other judges of the Superior Court and of the Territorial Court have in the past held "that joinder is inappropriate in mass actions like this one." *Id.* (citing *Abednego*, 63 V.I. at 191; *Alexander*, 1998 WL 35877034 at *2). Like those cases, in this case the "newly-amended complaint contains claims on behalf of over 150 plaintiffs residing on over one hundred different physical locations in four different neighborhoods (Enfield Green, Williams Delight, Estate Cane and Estate Diamond)." *Id.* at 3. Further, Hurricanes Irma and Maria significantly impacted many areas allegedly blackened by *Baudoinia* and, consequently, "[e]ach home [now] presents a different set of facts making joinder of these claims inappropriate," Defendants argue. *Id.* at 6. Finally, the Virgin Islands has not adopted class action tolling yet. If it does apply, then "individual inquiries are necessary to determine which of the Plaintiffs fell within the class definition. As this Court is aware, Plaintiffs revised their class definition five times prior to withdrawing the class allegations, further complicating the inquiry." *Id.* at 3 n.2. And even "if class action tolling does not apply, individual inquiries would be required," Defendants argue, "to determine if any particular Plaintiff's claim relates back pursuant to Rule 15(c). In either case, such issues can only be resolved on an individual basis." *Id.*

Plaintiffs, in reply, assert that "Defendants know better." (Pls.' Reply to Defs.' Jt Resp. to Pls.' Br. in Resp. to Order to Show Cause 1, filed Feb. 23, 2018. ("Pls.' Reply.").) As the Plaintiffs see it, "there is no question that [their] claim[s] arise out of the same occurrence – the emission of ethanol from defendants' rum storage operations on St. Croix. Defendants cannot seriously argue otherwise." *Id.* In fact, Defendants "stipulated to the filing of an amended complaint for the explicit purpose of joining additional individual plaintiffs," Plaintiffs note. *Id.* "And that is why they did not object to the joinder of plaintiffs in responding to the amended complaint." *Id.* Also "differences in the amount or extent of damages plaintiffs suffered does not defeat joinder. Rule 20 does not require factual uniformity among plaintiffs' claims. It only requires that the claims arise out of the same occurrence and involve at least one common question of law or fact," Plaintiffs contend. *Id.* at 2.

Plaintiffs objections do not fall on deaf ears. Whether joinder is proper here is a close call. The claims are the same: nuisance, negligence, and trespass. Some questions of law and fact will be common to all. But the Court cannot agree that in this instance, every claim arises from the same transaction or occurrence. Several reasons lend support.

(1) Potential Conflicts Among Competing Counsel

First, a point of procedure: by order entered May 24, 2016, the Court granted a motion filed by counsel for Plaintiffs for leave to withdraw as counsel, but only for Alicia Sanes. By notice filed July 5, 2016, counsel reappeared on Ms. Sanes' behalf. Subsequently, the Court approved the dismissal of Ms. Sanes, yet her status in this case remains an enigma. She was dismissed but remains a party. Her attorneys withdrew, and then reappeared. Assuming, *arguendo*, that counsel had not reappeared, or that other plaintiffs might also seek to discharge or substitute counsel (given the number of plaintiffs in this case), this civil action could find itself pulled in different directions by competing plaintiffs' counsel or by *pro se* plaintiffs competing with their former attorneys. Years ago, the federal courts cautioned against "overlapping duplication in motion practices and pre-trial procedures occasioned by competing counsel representing different plaintiffs in separate actions."

In re: Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987, 737 F. Supp. 396, 398 (E.D. Mich. 1989) (bracketed ellipsis and citation omitted); *accord MacAlister v. Guterma*, 263 F.2d 65, 68 (2d Cir. 1958). Although there, the courts spoke of the trial court's inherent authority to consolidate multiple actions and appoint lead counsel in complex litigation cases under Federal Rule of Civil Procedure 42(a), the concerns raised about "effective means of channeling the efforts of counsel along constructive lines" while still ensuring that "each counsel is still free to present his own case" *MacAlister*, 263 F.2d at 68, are equally apt here. In other words, unlike the *Air Crash Disaster* cases (multiple tort actions) or the *MacAlister* cases (stockholder derivative actions), which involved different cases grouped together for pretrial purposes, here there is only one case, but with multiple plaintiffs and the potential for new counsel to appear over time. Dropping the plaintiffs and severing their claims will ensure that each plaintiff has her or his own case to go forward in, thereby avoiding potential delays to the other plaintiffs.

(2) Filing Fees

Second, and more important, only one filing fee has been paid. Courts in the Virgin Islands have repeatedly held that payment of the filing fee is mandatory and cannot be excused unless a party is allowed to proceed *in forma pauperis*. *See* 4 V.I.C. § 513. The reason why is because "a party's failure to pay a filing fee required by law implicates interests beyond those of the parties." *Mustafa v. Camacho*, 59 V.I. 566, 571 n.2 (V.I. 2013) (*per curiam*). That said, courts also must avoid "engag[ing] in a procedure that 'runs counter to the interests of judicial economy' by requiring [a party] 'to reinstate an action and pay a second filing fee' for essentially no reason at all." *Hamed v. Hamed*, 63 V.I. 529, 533, n.3 (V.I. 2015) (quoting *In re: Change of Name of Reynolds*, 60 V.I. 330, 336 (V.I. 2013)).

Both the code and the rules of court are silent as to how many persons can join together as plaintiffs in the same action. Courts in other jurisdictions have also struggled with this question, particularly given the increase in complex litigation and mass tort cases. *See, e.g.*, *Cable v. Hatfield*, 505 S.E.2d 701, 707-08 (W. Va. 1998) ("Our rules of civil procedure permit multiple plaintiffs to join in a single action, under the appropriate circumstances. Increasingly, numerous parties will join in an action as authorized by Rule 20. The mass litigation that can result imposes a significant burden, financial and otherwise, on circuit clerks' offices. However, the West Virginia Rules of Civil Procedure are silent with regard to the filing fee to be charged when multiple parties choose to join in one action." (internal citation omitted)). The question crosses many areas of civil litigation, including whether a civil action is removable to federal court. *Cf. In re: Prempro Prods. Liab. Litig.*, 591 F.3d 613, 624 n.8 (8th Cir. 2010) ("Considering the uncertainty surrounding the propriety of the joinder of plaintiffs' claims, the preferable course of action may have been for defendants to challenge the misjoinder in state court before it sought removal." (citing 14B Charles A. Wright et al., *Federal Practice and Procedure* § 3723, at 658 (3d ed. 1998)).

Some jurisdictions allow multiple plaintiffs to join in a single complaint but still assess a filing fee for everyone. *E.g.*, *State ex rel. J.C. v. Mazzone*, 759 S.E.2d 200, 214 n.32 (W. Va. 2014). Courts in Mississippi had begun assessing separate filing fees for each plaintiff in multiple-plaintiff cases until the Supreme Court of Mississippi disallowed that practice. *See id.* (citing *Hinds Cty. Bd. of Supervisors v. Abnie*, 934 So. 2d 996, 999 (Miss. 2006)). Considering the same question, the Supreme Court of West Virginia concluded that the correct approach in cases with multiple plaintiffs is for the clerk of court to accept the complaint and assess a single filing fee but allow the assigned trial court judge to determine whether joinder was proper. *See Cable*, 505 S.E.2d at 709.

Courts in the Virgin Islands also have struggled with this question. *E.g.*, *In re: Red Dust Claims*, SX-15-CV-620, 2017 V.I. LEXIS 98, *4-5 (V.I. Super. Ct. July 7, 2017) (explaining that "the filing fee cannot be waived (as it is required by statute and would have been assessed had each Plaintiff filed individually)." (citation omitted)); *see also In re: Cases Removed to the Dist. Court of the V.I.*, Nos. SX-98-CV-109, *et seq.*, 2016 V.I. LEXIS 154, *54 n.30 (V.I. Super. Ct. Sep. 21, 2016) (acknowledging that the statutory filing fee appeared to be the concern underlying the misjoinder found in *Alexander*, 1998 V.I. LEXIS 36). In each instance, the claims of all plaintiffs other than the first-named plaintiff were severed and the other named-plaintiffs dropped and ordered to refile individually. *Accord Abednego*, 63 V.I. at 193 (same).

In this instance, eight persons were named in the initial complaint. Because only one complaint was filed, the Clerk assessed one $75.00 filing fee. However, once Plaintiffs abandoned their attempts to certify a class, the number of parties to this action expanded to more than 150 plaintiffs, admittedly with this Court's blessing at first. (*Cf.* Order Approving Joint Stipulation ¶ 7, entered June 5, 2017 (allowing counsel time to determine whether additional plaintiffs should be added).) However, but for original eight Plaintiffs commencing this case as a putative class action, all other persons would have had to file a complaint, either individually or perhaps by household, and pay the statutorily-mandated filing fee or seek leave to proceed *in forma pauperis*. Considering that the Legislature vested the Judiciary with the discretion to waive filing fees for persons who cannot afford to pay, it implies that those who can afford to pay should pay. Here, it is not possible to determine who can or cannot pay since all plaintiffs joined together in the same complaint. Here, it would be patently unfair to allow 155 individuals to join together and seek individualized damage amounts and yet pay only 48¢ apiece to have commenced this civil action. That percentage of the filing fee would be further reduced if additional party-plaintiffs are identified. Courts have made clear that the filing fee requirement cannot override the right to join parties in the same complaint. *Cf. Mazzone*, 759 S.E.2d at 212-13. But it is a concern that should be considered.

(3) Same Transaction or Occurrence

But the most important reason why the Court finds joinder improper here is because all the Plaintiffs' claims did not arise from the same transaction or occurrence. Virgin Islands Rule of Civil Procedure 20 allows persons to join as plaintiffs "if: (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action. V.I. R. Civ. P. 20(a)(1) (paragraph breaks omitted). The reporter's notes to Rule 20 states that "multiple plaintiff's [sic] may join in one action . . . so long as there is at least one question of law or fact common to all plaintiffs." V.I. R. Civ. P. 20 (rptr's note); *cf. Wilson v. Hess Oil V.I. Corp.*, 67 V.I. 523, 529-30 (Super. Ct. 2017) ("The notes of the reporter concerning the intent of rules are controlling absent precedent to the contrary." (citations omitted)). This interpretation mirrors how other jurisdictions construe the requirements of joinder. *E.g.*, *Alexander*, 207 F.3d at 1323 (must establish two prerequisites) (citing Fed. R. Civ. P. 20(a)); *Stojcevski v. Cty. of Macomb*, 143 F. Supp. 3d 675, 682 (E.D. Mich. 2015) ("Both requirements must be satisfied and if the plaintiffs fail to meet both, the court has the discretion to sever the misjoined plaintiffs, as long as no substantial right will be prejudiced by the severance." (quotation marks and citation omitted)); *Grennell v. W. S. Life Ins. Co.*, 298 F. Supp. 2d 390, 397 (S.D. W. Va. 2004) ("West Virginia rules regarding permissive joinder are substantially similar to their federal counterparts."); *Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092, 1097 (Miss. 2004) (*en banc*) ("Joinder of parties under Rule 20(a) *is not unlimited* . . . . Rule 20(a) imposes two specific requisites to the joinder of parties." (quoting Miss. R. Civ. P. 20(a) cmt)). *But cf. Armond*, 866 So. 2d at 1103 (Graves, J, concurring) ("Our Rule 20 has long been used in lieu of a class action rule.").

Taking the second factor first – clearly there is at least one legal question common to all the Plaintiffs here, e.g., whether Plaintiffs' claims are preempted by the Clean Air Act. *But see Alleyne*, 63 V.I. at 391 (concluding that the Clean Air Act did not preempt Plaintiffs' claims). There is also at least one factual question common to all Plaintiffs, i.e., whether *Baudoinia* is the source of the damage to their properties and whether Cruzan, Diageo, or both are liable. "Courts have held that commonality under the rule is not a difficult test to satisfy. Rule 20(a) requires only a single common question be shown, not multiple common questions. The common question of fact or law need not be the most important or predominant issue in the litigation." *Mazzone*, 759 S.E.2d at 207-08 (quotation marks and citations omitted); *accord Alexander*, 207 F.3d at 1324 ("The second prong of Rule 20 does not require that *all* questions of law and fact raised by the dispute be common, but only that *some* question of law or fact be common to all parties." (citation omitted)). Clearly, Plaintiffs satisfy the second factor.

But more than a common factual or legal question is needed. Joinder under Rule 20 also requires a "right to relief" asserted "jointly, severally, or in the alternative" by all Plaintiffs. V.I. R. Civ. P. 20(a)(1). In other words, each plaintiff must assert the same right or rights to relief against every defendant concerning the same transaction or occurrence, or series of transactions or occurrences. *Cf. Armond*, 866 So. 2d at 1102 (reversing joinder where there was "no single transaction or occurrence or series of transactions or occurrences connecting all 56 plaintiffs and 42 physician defendants."). Admittedly, this area of the law is rife with confusion. *See id.* at 1103

(Greaves, J., concurring) (discussing Mississippi's struggles with permissive joinder in the absence of a rule allowing class actions) ("We have always wrestled with defining the scope of permissive joinder."). And the confusion and uncertainty regarding the extent of permissive joinder is shown here by Plaintiffs' contention that their claims "arise out of the same event – the emission of ethanol from defendants' rum storage operations." (Pls.' Br. 2.) If that were enough, Plaintiffs would have satisfied the first factor too. But Plaintiffs misread the rule.

First, technically, Rule 20 does not refer to events, but to transactions or occurrences. *But see Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C.*, 760 F.3d 405, 409 (5th Cir. 2014) ("[T]he words 'event' and 'occurrence' can be understood as synonymous." (citing *American Heritage Dictionary of the English Language* 615 (5th ed. 2011)). As the District Court of the Virgin Islands observed in another mass action case arising in the Virgin Islands, albeit one involving an exception to the Class Action Fairness Act ("CAFA"),[6] that

> [t]he word event . . . is not always confined to a discrete happening that occurs over a short time span such as a fire, explosion, hurricane, or chemical spill. For example, one can speak of the Civil War as a defining event in American history, even though it took place over a four-year period and involved many battles. We think that an event, as used in CAFA, encompasses a continuing tort which results in a regular or continuous release of toxic or hazardous chemicals, as allegedly is occurring here, and where there is no superseding occurrence or significant interruption that breaks the chain of causation.

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[6] CAFA defines a "mass action" as any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a). Section 1711(2) defines "class action" as any civil action filed under Federal Rule of Civil Procedure 23 or a state statute or rule authorizing a representative action. Unlike a class action, a mass action has no representative or absent members because all plaintiffs in a mass action are named in the complaint and propose a joint trial of their claims. A mass action is more akin to an opt-in than it is to a class action.

Abraham v. St. Croix Renaissance Grp., L.L.L.P., 58 V.I. 788, 791 n.1 (3d Cir. 2012) (quoting 28 U.S.C. § 1332(d)(11)(B)(i)) (citations and paragraph break omitted).

Abraham v. St. Croix Renaissance Grp., L.L.L.P., Civ. No. 12-11, 2012 U.S. Dist. LEXIS 173648, *9-10 (D.V.I. Dec. 7, 2012) (footnote omitted), *aff'd* 58 V.I. 788 (3d Cir. 2013), *cert. denied*, 571 U.S. 1125 (2014). On appeal, the United States Court of Appeals for the Third Circuit agreed, explaining that "treating a continuing set of circumstances collectively as an "event or occurrence" for purposes of the mass-action exclusion is consistent with the ordinary usage of these words, which do not necessarily have a temporal limitation." 58 V.I. at 799 (internal citation omitted). Of course, CAFA is not a concern here because the Superior Court of the Virgin Islands is not a federal district court and further, because Plaintiffs abandoned their attempts to certify a class. But *Abraham*'s discussion of the word "event" is instructive because it shows how the word could be construed broadly or narrowly. Event is simply not relevant to assessing joinder under Rule 20. Instead, the focus is whether the claims arose from the same transaction or occurrence.

But courts also struggle with the phrase "same transaction or occurrence."[7] *Compare Armond*, 886 So. 2d at 1097-1101 (discussing and distinguishing similar cases in which joinder was upheld), *with id.* at 1103 (Greaves, J., concurring) ("It is no wonder that a type of 'super-joinder' arose under our Rule 20. Plaintiffs in our state courts were forbidden from invoking any sort of class action, and so joinder slowly grew to encompass the massive and unwieldy actions the majority rightfully struggles with today."). "Some [federal] courts have adopted the 'logical-relationship' test used in the context of Federal Rule of Civil Procedure 13 to determine whether the plaintiffs' claims

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[7] The "struggle" is oftentimes apparent when a case is removed to federal court, triggering accusations of fraudulent joinder. *Cf. Grennell*, 298 F. Supp. 2d at 395 ("[C]ourts have held that fraudulent joinder of plaintiffs is no more an impediment to diversity jurisdiction than fraudulent joinder of defendants." (collecting cases). One court has observed that the better approach may be to have the propriety of joinder resolved in state or territorial court before removing the case(s). *See In re: Prempro Prods. Liab. Litig.*, 591 F.3d 613, 623-24 (8th Cir. 2010) ("It may be that the plaintiffs' claims are not properly joined, and it has been suggested that the proper procedure may be for the manufacturers to argue that to the state court." (footnote and citations omitted)).

arise out of 'the same series of transactions or occurrences' for purposes of satisfying Rule 20's requirements." *Stojcevski*, 143 F. Supp. 3d at 682 (citations omitted); *accord Anderson v. NVR, Inc.*, 300 F.R.D. 116, 118 (W.D.N.Y. 2014); *see also Mazzone*, 759 S.E.2d at 207 ("The same transaction or occurrence prong of Rule 20(a) means all logically related events. This does not mean that all events must be identical." (citation omitted)). Other federal courts favor more of a case-by-case approach. *E.g.*, *Insolia v. Philip Morris, Inc.*, 186 F.R.D. 547, 549 (W.D. Wis. 1999) ("The permissive joinder doctrine is animated by several policies, including the promotion of efficiency, convenience, consistency, and fundamental fairness. These policies, not a bright-line rule, should govern whether the 'same transaction' requirement imposed by Rule 20 has been satisfied." (citations omitted)); *see also Dixon v. Scott Fetzer Co.*, 317 F.R.D. 329, 331 (D. Conn. 2016) ("What will constitute the same transaction or occurrence under the first prong of Rule 20(a) is approached on a case by case basis." (quoting *Kehr ex rel. Kehr v. Yamaha Motor Corp., U.S.A.*, 596 F. Supp. 2d 821, 826 (S.D.N.Y. 2008)). But herein lies the problem because whether under a case-by-case approach or by looking for a logical relationship between claims, consistency and predictability is truly not possible.

Courts came upon the logical relationship test by "look[ing] for meaning to Fed. R. Civ. P. 13(a) governing compulsory counterclaims." *Alexander*, 207 F.3d at 1323 (citing *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974)); *see also* Fed. R. Civ. P. 13(a)(1) (a compulsory counterclaim "arises out of the transaction or occurrence" of an opposing party's claim). Breach of contract is an example of a compulsory counterclaim under Virgin Islands law to an action for debt or foreclosure of a real property mortgage. *Cf. Seales v. Devine*, S. Ct. Civ. No. 2007-040, 2008 V.I. Supreme LEXIS 23, *7 (V.I. Mar. 3, 2008) (*per curiam*). But the problem with using Rule 13 to inform Rule 20 is two-fold. First, Rule 20 is a permissive rule and Rule 13 is a mandatory rule. Persons with the same claim do not have to join together in the same lawsuit. *Cf.* V.I. R. Civ. P. 20(a) ("may join"). But an opposing party will lose its claim if the claim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim," V.I. R. Civ. P. 13(a), and the opposing party does not plead it. Second, the rules of procedure do not operate in a vacuum. Rather, they intersect. And "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (*per curiam*). Rather, the rules must be applied evenhandedly to all.

If Rule 20(a) allows hundreds or even thousands of persons to join together in the same complaint as plaintiffs and assert the same right to relief against multiple defendants, then Rule 18(a) would also allow each plaintiff to also assert "as many claims as" they have against the defendants. V.I. R. Civ. P. 18(a).[8] *Accord Proctor v. Applegate*, 661 F. Supp. 2d 743, 778 (E.D. Mich. 2009) ("Where multiple parties are named, the analysis under Rule 20 precedes that under Rule 18."); *Kedra v. City of Philadelphia*, 454 F. Supp. 652, 661 n.6 (E.D. Pa. 1978) ("Once parties are joined under Rule 20(a), Rule 18(a)'s allowance of unlimited joinder of claims against those parties is fully applicable." (citation omitted)). Similarly, if Rule 20(a) allows hundreds or thousands of plaintiffs to join together in one complaint, then Rule 13(a) would also mandate that each defendant assert

[8] Assuming, *arguendo*, that one or more plaintiffs live downwind of Diageo, they might have a nuisance claim against Diageo if the emission of "ethanol into the estates surrounding their operations," (First Am. Compl. ¶ 142), was accompanied by odors. *Cf. Brockman v. Barton Brands, Ltd.*, 3:06CV-332-H, 2009 U.S. Dist. LEXIS 110387, *4 (W.D. Ky. Nov. 25, 2009) ("Plaintiffs, originally five residents living near Defendant's Bardstown, Ky. plant, filed this lawsuit as a putative class action in July 2006, alleging that more than 2,000 residents near the Barton Brands facility were potentially affected by odors and 'particulate matter' originating from Defendant's liquor distillery." (footnote omitted)). By contrast, other co-plaintiffs living downwind of Cruzan, but not Diageo, might not have an odor-based nuisance claim since Cruzan has operated on St. Croix for over 200 years and plaintiffs might have come to that nuisance. *Cf. Alleyne*, 63 V.I. at 407 ("Defendants point out the Plaintiffs purchased their properties after Cruzan had already been producing rum on St. Croix for many years, and that Plaintiffs have therefore 'come to the nuisance.'").

any counterclaims it has, even if only against one plaintiff. *But cf. Heaven v. Trust Co. Bank*, 118 F.3d 735 (11th Cir. 1997) (compulsory counterclaims may preclude pursuing a class action).

While neither scenario is raised here, and both are presented only hypothetically, the broader point is simply this: if Plaintiffs are correct—"that differences in the amount or extent of damages plaintiffs suffered does not defeat joinder," that "Rule 20 does not require factual uniformity among plaintiffs' claims" but rather only "at least one common question of law or fact," (Pls.' Reply 2)—then courts across the country have been wrong in finding in other mass tort cases that joinder was improper, particularly in asbestos and toxic tort cases because clearly in asbestos cases or tobacco litigation, for example, there are questions of law and fact that are common and the claims arose from the same occurrence, the placement of a harmful product into the stream of commerce or the failure to warn of the potential danger. "[C]ourts are inclined to find that claims arise out of the same transaction or occurrence when the likelihood of overlapping proof and duplication in testimony indicates that separate trials would result in delay, inconvenience, and added expense to the parties and to the court." *In re: Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 650 (S.D. Tex. 2005) (citation omitted). And evidence regarding business practices, product design and placement, and industry norms would overlap in many toxic tort cases. So, misjoinder should never be an issue.

But invariably courts do find joinder improper in toxic tort cases. *Cf. In re: Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 651 (S.D. Tex. 2005) (joinder of over 10,000 plaintiffs in silica litigation improper); *Insolia*, 186 F.R.D. at 550 (finding joinder in three-plaintiff tobacco case improper) ("[T]he only thread holding these disparate factual scenarios together is the allegation of an industry-wide conspiracy but this theory does not hold up on its terms much less under the weight of the individual issues associated with each plaintiff."); *see also 3M Co. v. Johnson*, 895 So. 2d 151, 158 (Miss. 2005) (joinder of more than 150 plaintiffs in asbestos litigation improper) ("[T]he only similar trait shared by the plaintiffs is the alleged exposure to asbestos at some point in their work history. The plaintiffs worked in different occupations, for different employers, at different times, were exposed to different products and used different respiratory protection equipment or no respiratory protection equipment at all.").

The only way these cases can be squared is if the transaction-or-occurrence language means the ***same*** transaction or occurrence for every person named as a plaintiff. Joinder of multiple plaintiffs was proper when the "allegations" involve "a pattern or practice of discrimination," *Alexander*, 207 F.3d at 1323, or "a company-wide policy purportedly designed to discriminate," *Mosley*, 497 F.2d at 1334, or "fraudulent misrepresentations by defendants to each of the plaintiffs in connection with the alleged sale by all of the defendants to the individual plaintiffs of 117 separate improved parcels of residential property." *W. Homes, Inc. v. Dist. Ct. of City & Cty. of Denver*, 296 P.2d 460, 461 (Colo. 1956). In those instances, the claims "'*share*[*d*] an aggregate of operative facts.'" *Stojcevski*, 143 F. Supp. 3d at 683 (quoting *In re: EMC Corp.*, 677 F.3d at 1358). But when the only connection between the plaintiffs was "the fraudulent acts" of the defendant, joinder was improper. *Grennell*, 298 F. Supp. 2d at 399 (finding joinder improper in "litigation involv[ing] more than 1,800 insurance policies, purchased at different times, in different places, and from different agents."). Similarly, claims of multiple prisoners typically cannot satisfy the transaction-or-occurrence language, for example, because of "the pervasive impracticalities associated with multiple-plaintiff prisoner litigation." *Proctor*, 661 F. Supp. 2d at 780 (citation omitted); *accord*

Boretsky v. Corzine, Civ. No. 08-2265, 2008 U.S. Dist. LEXIS 48003 *5 (D.N.J. June 23, 2008) ("[J]ail populations are notably transitory, making joint litigation difficult.").

Sharing an aggregate set of facts may be why "300+ 'contamination' plaintiffs" in *Adinolfe* could jointly allege "that each of their properties 'has been contaminated.'" 768 F.3d at 1172. Similarly, "the individual claims of 271 Plaintiffs" could be joined together in *Abrams* because all plaintiffs "alleged that the value of their property has diminished" after a chemical was released from a nearby plant. *Abrams*, 2008 WL 4710724 at *3. Plaintiffs rely on both cases to support their opposition to severance in this case. But whether joinder was proper was not at issue in *Adinolfe* or in *Abrams*, which makes Plaintiffs' reliance on both cases misplaced. (*Cf.* Pls.' Reply 2.) Joinder was at issue in *King v. Cole's Poultry, LLC*, No. 1:14-cv-088, 2016 WL 7227915 (N.D. Miss. Dec. 13, 2016), another case Plaintiffs rely on. (*See* Pls.' Reply 2-3.) There, fifty-seven plaintiffs' claims were not severed but because their nuisance claim was "not based on separate contracts or actions specific to any one individual plaintiff. Rather, Plaintiffs' claims are all based on the same underlying facts", namely "the foul, noxious, and potentially dangerous odors" and "millions of flies and other potentially harmful emission[s]" emanating from chicken farms in Monroe County, Mississippi.[9] *King*, 2016 WL 7227915 at *3, 1.

But here, Plaintiffs are not suing Diageo and Cruzan just to restrain them from maintaining a nuisance. If that were the crux of this case, there would be no question that joinder together was

[9] Plaintiffs are correct that *King* "is instructive." (Pls.' Reply 3.) But *King* is not persuasive here because it concerned a motion to sever based on fraudulent misjoinder, resolved under Mississippi Rule of Civil Procedure 20. *See id.* at *2 ("To determine whether Plaintiffs' claims were fraudulently misjoined, the Court looks to the Mississippi Rules of Civil Procedure." (citation omitted)). As discussed above, joinder under Mississippi procedural law diverged from federal procedural law and now requires an additional factor: a distinct litigable event. *See 3M Co.*, 895 So. 2d at 159 ("Immediately following the decision in *Armond*, we amended the comment to Rule 20 to clarify the meaning of the phrase 'transaction or occurrence.' The comment now states that 'the phrase "transaction or occurrence" requires that there be a distinct litigable event linking the parties.'" (quoting Miss. R. Civ. P. 20 cmt)).

proper. *Accord Goeke v. Nat'l Farms*, 512 N.W.2d 626, 630 (Neb. 1994) ("Thus, multiple plaintiffs may join in one suit to enjoin a nuisance so long as the alleged nuisance interferes with the rights of each plaintiff joined." (collecting cases and authorities)). Instead, Plaintiffs seek compensatory and punitive damages for negligence as well as intentional and negligent trespass. "It seems obvious that a trespass could occur intentionally or negligently and that these causes of action could carry with them vastly different sets of damages. Further, '[w]hile a trespass is a trespass, different recoveries are available, depending on whether the trespass was committed intentionally, negligently, accidentally, or by an abnormally dangerous activity." *Alleyne*, 63 V.I. at 411 (quoting *Coinmach Corp. v. Aspenwood Apt. Corp.*, 417 S.W.3d 909, 920 (Tex. 2013), parenthetically). Thus, Plaintiffs' proof of damages may differ in each case.

Plaintiffs respond that "[t]he need for individual damage assessments does not even defeat class certification, let alone joinder." (Pls.' Reply 3 n.1 (citing *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir. 2010).) But Plaintiffs misunderstand why. It may be true that, "the amount of damages is invariably an individual question and does not defeat class action treatment." *Yokoyama*, 594 F.3d at 1089 (quotation marks, citation, and brackets omitted)). But the reason why is because class actions provide a systematic method for determining fault for multiple people in the same trial. *Cf. Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 291 (2008) ("[C]lass actions constitute but one of several methods for bringing about aggregation of claims, i.e., they are but one of several methods by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum." (citations omitted)). And once fault is determined, damages can be assessed for the entire class. *Cf. Blackie*, 524 F.2d at 905 ("[S]hould the class prevail the amount of price inflation during the period can be charted and the process of computing individual damages will be virtually a mechanical task." (citation omitted)). But "[c]ourts have [also] denied class certification where these individual damages issues are especially complex or burdensome." *Smilow*, 323 F.3d at 40 n.8 (citation omitted).

Again, Plaintiffs objections do not fall on deaf ears because joinder is a close call here. *King*, *Adinolfe*, and *Abrams* do illustrate that plaintiffs can pursue nuisance claims jointly, but when the alleged nuisance interferes equally with all plaintiffs' rights. In this instance, however, the Court finds that Plaintiffs' claims do not arise from a single, (i.e., the same,) transaction or occurrence. Rather, the alleged growth of *Baudoinia* on each property is a different occurrence. Plaintiffs did not sue Cruzan and Diageo for damages based on one-time release of ethanol, but on the continuous release of ethanol over time that (allegedly) has caused rum fungus to grow. Proving causation may be different for each property. And even if joinder was proper here initially, the Court nonetheless will exercise its discretion and sever the Plaintiffs' claims because the determination of damages will have to be on a case-by-case basis. *E.g.*, *Cornell Malone Corp. v. Sisters of the Holy Family*, 922 F. Supp. 2d 550, 561 (E.D. La. 2013) ("[C]ourts may sever claims even where the requirements of Rule 20(a) for permissive joinder have been satisfied." (footnote omitted)); *Lover v. District of Columbia*, 248 F.R.D. 319, 323 (D.D.C. 2008) ("Even if the prerequisites for joinder are satisfied, the court should consider whether there is a risk of jury confusion before the claims of multiple plaintiffs can be tried in a single action.").

In this instance, allowing 155 plaintiffs to remain together in the same action, with each Plaintiff asserting possibly four claims each (620 claims in total) will not promote judicial economy. *See Lover*, 248 F.R.D. at 323 ("[T]he purpose behind Rule 20(a)—promoting judicial economy—'is not served where (as here) the incidents underlying the claims are wholly separate, so as to require entirely different proof.'" (quoting *Harris v. Spellman*, 150 F.R.D. 130, 132 (N.D. Ill. 1993)). Considering the points Cruzan and Diageo make, namely that the Virgin Islands has not adopted class action tolling yet, and that Hurricanes Irma and Maria may be an intervening act for some Plaintiffs whose homes were damaged, it may "be highly prejudicial to force the Defendants to litigate these disparate claims in one single case." (Def's Mot. 6.) Furthermore, courts consider judicial economy throughout the life of a case and not just at discrete stages. Here, for example, addressing dispositive pre-trial motions like motions for summary judgment or conducting trial for 155 plaintiffs would not promote judicial economy. Even if a few Plaintiffs' claims proceeded to trial, all Plaintiffs who obtained a jury verdict in their favor could not enforce their judgments and no order in this case would be final and appealable until all 155 Plaintiffs' claims had been decided on the merits, either through trial or dispositive motion. *Cf. In re: Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 589 (6th Cir. 2013) ("When a single action presents multiple claims or involves multiple parties, a district court ruling that disposes of only some claims or only some parties is ordinarily not 'final.'"); *see also Stiles v. Yob*, S. Ct. Civ. No. 2016-0027, 2016 V.I. Supreme LEXIS 23, *9 (V.I. June 8, 2016) (statutory appellate jurisdiction cannot be expanded by rules of procedure). If the Plaintiffs' response to this point were that the cases could be severed shortly before trial, then they can be severed now too.

Courts retain discretion to sever claims in the interests of judicial economy. *Cf.* V.I. R. Civ. P. 21; *accord Abednego*, 63 V.I. at 193. Accordingly, the Court will sever the claims of all Plaintiffs except Ryan Alleyne and drop the other Plaintiffs. Those persons who owned the same home or lived together in the same household during the relevant time frame may join in the same complaint. Since the Presiding Judge of the Superior Court has already designated this case as complex, *see*

Super Ct. R. 21(d) (judge may determine "determine, at any point in the proceedings, that a case is complex"), the Court will direct the Clerk to open a master case captioned as *In re: Rum Fungus Claims* and establish "Rum Fungus" as a category of cases within the newly-created Complex Litigation Division. *See* Super. Ct. R. 22(a)-(b); *see also In re: Establishment of a Complex Litig. Div. within the Super. Ct. of the V.I.*, ST-18-MC-030, 2018 V.I. LEXIS 51, *4 (V.I. Super. Ct. May 11, 2018) ("[E]ffective October 1, 2018, a Complex Litigation Division is established within the Superior Court of the Virgin Islands."), *approved in part on other grounds by In re: Amendments to the Rules Gov. the Super. Ct. of the V.I.*, S. Ct. Civ. 2018-022, 2018 V.I. Supreme LEXIS 75 (V.I. May 22, 2018).

III. CONCLUSION

For the reasons stated above, the Court will grant Defendants' motion for a more definite statement in part and grant Plaintiffs' motion for leave to file a second-amended complaint but sever the claims and drop all Plaintiffs other than Ryan Alleyne and any Plaintiff(s) who reside with him. Ryan Alleyne will be ordered to refile a second-amended complaint and the other Plaintiffs to refile individually and pay the appropriate filing fees. Further, and notwithstanding that ordering a more definite statement does not require the filing of an amended pleading, the Court will nonetheless order the Plaintiffs to incorporate into their forthcoming complaints. Lastly, the Court will also direct the Clerk to open a master case and docket to coordinate these complex litigation cases. Appropriate orders follow.

Date: September 10, 2018.

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE,
Clerk of the Court
By: ______________________
Court Clerk Supervisor
Dated: 9/10/18